SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2003-000535-001 DT 04/14/2004

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED:_____

KITCHEN AND BATH DEPOT INC

IVAN KOLESIK JR.

v.

ISRAEL TORRES (001)
CHUCK SMITH (001)

MONTGOMERY LEE
CHUCK SMITH
712 E MANHATTAN DRIVE
TEMPE AZ 85282

AZ REGISTRAR OF CONTRACTORS
OFFICE OF ADMINISTRATIVE
HEARINGS

MINUTE ENTRY

Pursuant to A.R.S §12-910(e) this court may review administrative decisions in special actions and proceedings in which the State is a party:

> The court may affirm, reverse, modify or vacate and remand the agency action. The court shall affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion.

The scope of review of an agency determination under administrative review places the burden upon the Plaintiff to demonstrate that the agency's decision was arbitrary, capricious, or involved an abuse of discretion.[1] The reviewing court may not substitute its own discretion for

[1] Sundown Imports, Inc. v. Ariz. Dept. of Transp., 115 Ariz. 428, 431, 565 P.2d 1289, 1292 (App. 1977); Klomp v. Ariz. Dept. of Economic Security, 125 Ariz. 556, 611 P.2d 560 (App. 1980).

that exercised by the agency,[2] nor may it act as the trier of fact,[3] but must only determine if there is any competent evidence to sustain the decision.[4] This court may not function as "super agency" and substitute its own judgment for that of the agency where factual questions and agency expertise are involved.[5]

This matter has been under advisement and I have considered and reviewed the record of the proceedings from the administrative hearing, exhibits made of record and the memoranda submitted. Here, Plaintiff, Kitchen & Bath Depot, Inc., seeks review of the Registrar of Contractors' (hereinafter "ROC") administrative order. After a careful review of the record, I find sufficient competent evidence to affirm the decision of the ROC.

Only where the administrative decision is unsupported by competent evidence may the trial court set it aside as being arbitrary and capricious.[6] In determining whether an administrative agency has abused its discretion, we review the record to determine whether there has been "unreasoning action, without consideration and in disregard for facts and circumstances; where there is room for two opinions, the action is not arbitrary or capricious if exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached."[7]

Facts

In December of 1999, ROC Complainant/Real Party-in-Interest, Chuck Smith (hereinafter "Complainant"), entered into a contract with Plaintiff, Kitchen & Bath Depot, Inc., to have Plaintiff remodel his master bathroom. In July of 2000, Complainant sent notice to Plaintiff that there were several outstanding repairs, yet Plaintiff failed to make all of the necessary repairs to fulfill the terms of the agreement. On January 31, 2002, Complainant filed a complaint against Plaintiff with the ROC alleging, *inter alia*, defective workmanship, abandonment of the project, and aiding and abetting unlicensed persons performing work without a contractor's license. On May 31, 2002, the ROC issued a Citation and Complaint charging Plaintiff with several violations.[8] Plaintiff failed to respond to the ROC's Citation and Complaint in a timely manner, as required by A.R.S. §32-1155(A). Hence, on June 21, 2002, the ROC issued a default Decision and Order, finding Plaintiff guilty of the Complaint's alleged

[2] *Ariz. Dept.of Economic Security v. Lidback*, 26 Ariz. App. 143, 145, 546 P.2d 1152, 1154 (1976).
[3] *Siler v. Arizona Dept. of Real Estate*,193 Ariz. 374, 972 P.2d 1010 (App. 1998).
[4] *Schade v. Arizona State Retirement System*, 109 Ariz. 396, 398, 510 P.2d 42, 44 (1973); *Welsh v. Arizona State Board of Accountancy*, 14 Ariz.App. 432, 484 P.2d 201 (1971).
[5] *DeGroot v. Arizona Racing Com'n*,141 Ariz. 331, 336, 686 P.2d 1301, 1306 (App. 1984).
[6] *City of Tucson v. Mills*, 114 Ariz. 107, 559 P.2d 663 (App. 1976).
[7] *Tucson Public Schools, District No. 1 of Pima County v. Green*, 17 Ariz.App. 91, 94, 495 P.2d 861, 864 (1972), as cited by *Petras v. Arizona State Liquor Board*, 129 Ariz. 449, 452, 631 P.2d 1107, 1110 (App. 1981).
[8] A.R.S. §32-1154(A)(1), (2), (7), (9), (10), (12-14), (16), (23), A.R.S. §32-1158, and A.A.C. R4-9-108.

violations. The ROC ordered that Plaintiff's contractor's license be revoked if Plaintiff failed to cure the defects listed in the Complaint by July 31, 2002. A compliance hearing was held on January 8, 2003, wherein an Administrative Law Judge (hereinafter "ALJ") found that Plaintiff failed to rectify the defects as listed in the Complaint. On February 11, 2003, the ROC adopted the ALJ's recommendation that Plaintiff's contractor's license be revoked, effective March 23, 2003. Plaintiff now brings the matter before this court.

Issues & Analysis

The first issue Plaintiff brings to the bar is whether the ROC's Citation and Complaint was void due to defective service. A.R.S. §32-1155(A) states in pertinent part:

> Service of citation upon the licensee shall be fully effected by personal service or by mailing a true copy thereof, together with a true copy of the complaint, by registered mail in a sealed envelope with postage prepaid and addressed to the licensee at the licensee's latest address of record in the registrar's office. Service of the citation and complaint shall be complete at the time of personal service or five days after deposit in the mail.

Contrary to Plaintiff's claim, nowhere in the record does the ROC admit defective service of the May 31, 2002 Citation and Complaint. Plaintiff admits service of the Citation and Complaint in a June 26, 2002 letter to the ROC, wherein Joel Stern, former principal of Plaintiff corporation states:

> Upon receiving a complaint from the Registrar's office that was mailed on May 31, 2002 I called and spoke with Ted Garold. I did not understand what I had just received nor why I received it. In fact, there were two missing pages that Ted then faxed over to me. [emphasis added]

Nothing in the record supports Plaintiff's allegations that two pages of the ROC's Citation and Complaint were missing, except Stern's comments. In fact, the ALJ found "that Joel Stern's testimony at the hearing was inconsistent, and generally not credible."[9] A reviewing court shall afford great weight to an ALJ's assessment of witnesses' credibility and should not reverse the administrative agency's weighing of evidence absent clear error.[10] Further, as a matter of law, if

[9] Administrative Law Judge's Decision, p. 3, ll. 10-11.
[10] See, In re: Estate of Shumway, 197 Ariz. 57, 3 P.3d 977, review granted in part, opinion vacated in part 9 P.3d 1062; *Ryder v. Leach*, 3 Ariz. 129, 77P. 490 (1889).

a party has appeared[11] and been given a full opportunity to defend himself, no defects in service of process will render the judgment void and subject to subsequent attack.[12] Plaintiff appeared and had a full opportunity to defend itself at the Compliance Hearing, which was requested by Plaintiff. Thus, even if this court found that service was defective, Plaintiff acknowledged service and waived its right to object to improper service by appearing at the Compliance Hearing. All the same, I find that service was proper in the case.

The second issue is whether Plaintiff fully answered the Citation and Complaint. This issue was address by the ALJ, wherein the ALJ found that Plaintiff did not answer the Citation and Complaint. Hence, this issue concerns the sufficiency of evidence to warrant the ALJ's finding. When reviewing the sufficiency of the evidence, a reviewing court must not re-weigh the evidence to determine if it would reach the same conclusion as the original trier of fact.[13] All evidence will be viewed in a light most favorable to sustaining a decision and all reasonable inferences will be resolved against the Plaintiff.[14] If conflicts in evidence exist, the reviewing court must resolve such conflicts in favor of sustaining the decision and against the Plaintiff.[15] When the sufficiency of evidence to support a decision is questioned on review, a reviewing court will examine the record only to determine whether substantial evidence exists to support the action of the administrative agency.[16] The Arizona Supreme Court has explained in *State v. Tison*[17] that "substantial evidence" means:

> More than a scintilla and is such proof as a reasonable mind would employ to support the conclusion reached. It is of a character which would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. If reasonable men may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial.[18]

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[11] "Broadly stated, any action on the part of defendant, except to object to the jurisdiction over his person which recognizes the case as in court, will constitute a general appearance; but, 'although an act of defendant may have some relation to the cause, it does not constitute a general appearance, if it in no way recognizes that the cause is properly pending or that the court has jurisdiction, And no affirmative action is sought from the court." *Austin v. State ex rel. Herman*, 10 Ariz.App. 474, 477, 459 P.2d 753, 756 (App. 1969), quoting *Pellegrini v. Roux Distributing Co.*, 170 Pa.Super. 68, 84 A.2d 222, 224.

[12] *Hill Bros. Chemical Co. v. Grandinetti*, 123 Ariz. 84, 88, 597 P.2d 987, 991 (App. 1979).

[13] *State v. Guerra*, 161 Ariz. 289, 778 P.2d 1185 (1989); *State v. Mincey*, 141 Ariz. 425, 687 P.2d 1180, cert. denied, 469 U.S. 1040, 105 S.Ct. 521, 83 L.Ed.2d 409 (1984); *State v. Brown*, 125 Ariz. 160, 608 P.2d 299 (1980); *Hollis v. Industrial Commission*, 94 Ariz. 113, 382 P.2d 226 (1963).

[14] *Guerra*, supra; *State v. Tison*, 129 Ariz. 546, 633 P.2d 355 (1981), cert. denied, 459 U.S. 882, 103 S.Ct. 180, 74 L.Ed.2d 147 (1982).

[15] *Guerra*, supra; *State v. Girdler*, 138 Ariz. 482, 675 P.2d 1301 (1983), cert. denied, 467 U.S. 1244, 104 S.Ct. 3519, 82 L.Ed.2d 826 (1984).

[16] *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 961 P.2d 449 (1998); *State v. Guerra*, supra; State ex rel. *Herman v. Schaffer*, 110 Ariz. 91, 515 P.2d 593 (1973).

[17] Supra.

[18] *Tison*, at 553, 633 P.2d at 362.

I find that the record supports the ALJ's conclusion that Plaintiff did not file an answer to the Citation and Complaint. Plaintiff's May 23, 2002 letter to Ted Gerold, an inspector for the ROC, was not an answer to the Citation and Complaint, as it was sent to the ROC inspector well before the Citation and Complaint was issued. Plaintiff's June 26, 2002 letter to the ROC simply requested a Default Hearing, and the ROC appropriately treated the letter as a Request for Rehearing. Therefore, I affirm the administrative agency's decision concerning this issue, for it was clearly supported by substantial evidence. Consequently, Plaintiff's assertion that the ROC improperly applied (retroactively) A.R.S. §32-1155(A) to the facts has no bearing, for irrespective of the version of the statute applied to the case, 2002 or 2003, Plaintiff failed to answer the Citation and Complaint altogether.

The final issue is whether it was impossible for Plaintiff to have obtained the proper permits to comply with the ROC's Corrective Order. Plaintiff claims that such permits were impossible to obtain, because Complainant obtained a permit on March 8, 2002. The record shows that Plaintiff failed to obtain the proper permits from the very beginning of the remodeling project, thus violating A.R.S §32-1154(A)(2). After March 8, 2002, Plaintiff could have completed the corrective work, as the proper permits had been issued to Complainant. Why did Plaintiff not attempt to do the corrective work while Complainant had the proper permits? Better, why did Plaintiff fail to obtain the proper permits from the very beginning of the remodeling project? Any "impossibility" alleged by Plaintiff was a result of its own disregard for the law. Regardless, there were many *other* issues in listed in the Complaint violating A.R.S. §32-1154(A) that were not rectified by Plaintiff. Consequently, it was proper for the ROC to revoke Plaintiff's contractor's license.

IT IS ORDERED affirming the decision of the Registrar of Contractors.

IT IS FURTHER ORDERED denying all relief as requested by the Plaintiff in its complaint.

IT IS FURTHER ORDERED that counsel for the Defendant shall prepare and lodge a judgment consistent with this minute entry opinion no later than May 5, 2004.